IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
March 17, 2009 Session

STATE OF TENNESSEE v. ERNEST GENTRY BURTON

Direct Appeal from the Criminal Court for Sumner County
No. 777-2006 Dee David Gay, Judge

No. M2008-00431-CCA-R3-CD - Filed August 3, 2009

A Sumner County jury convicted the Defendant, Ernest Gentry Burton, of possession of a Schedule II controlled substance; driving on a revoked license, second offense; and attempting to tamper with evidence. The trial court sentenced him to eight years for the attempting to tamper with evidence conviction and ordered that sentence to run concurrently to a sentence of eleven months and twenty-nine days for driving on a revoked license and consecutively to a sentence of eleven months and twenty-nine days for the possession conviction. On appeal, the Defendant contends that: (1) the trial judge erred when he failed to *sua sponte* recuse himself; (2) the trial judge improperly commented on the credibility of a state witness in the presence of the jury; (3) the trial judge conducted an improper, independent investigation of the Defendant's prior criminal history before sentencing the Defendant; and (4) the trial judge ordered him to serve an excessive sentence. After a thorough review of the record and applicable authorities, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JR., JJ., joined.

C. Jay Ingrum, Gallatin, Tennessee, for the Appellant, Ernest Gentry Burton.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Cameron L. Hyder, Assistant Attorney General; L. Ray Whitley, District Attorney General; Lytle Anthony James, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION
I. Facts and Sentencing Hearing
A. Facts

A Sumner County Grand Jury indicted the Defendant for possession of a Schedule II controlled substance with intent to sell or deliver, driving on a suspended license, and tampering

with evidence. At the Defendant's trial, the following evidence was presented: Larry Burke, with the Gallatin Police Department, testified that he is assigned to the "vice" division, which investigates drugs, gangs, and prostitution. Officer Burke testified that an anonymous individual filed a complaint on July 27, 2006, about drug activity in Gallatin. In response to that individual's complaint, Officer Burke began surveillance on August 9, 2006, of 1227 Woods Ferry Road ("1227") in Gallatin, which was owned by James Murray. James Murray's daughter, Yvonne Collins, lived at the house with the Defendant. Officer Burke watched the residence, observing who frequented the house, and he took pictures of cars that stopped by the residence.

Officer Burke testified about some of the photographs he had taken. He said one picture depicted a red vehicle registered to James Murray. Another depicted a Saturn coupe registered to Eric Burton, the Defendant's son and a codefendant in this case. The Saturn coupe's tags were registered, however, to a Ford van.

Officer Burke said that on August 10, 2006, he followed the red Toyota registered to Murray, which was being driven by the Defendant, to the Dollar General Store. There, he saw the Defendant pull up next to Toni McCormick's parked car so that the driver's side windows of both cars faced each other. The two had a brief conversation. This interaction confirmed some of the information the officer received from the anonymous caller. Later that same day, Officer Burke saw the Defendant behind the wheel of a black car parked at 1227. The Defendant entered the house and a man whom the officer did not know drove the black car away.

On August 10, 2006, a tan Ford Escort, registered to Candy Gaston Webb and driven by Robert Webb, arrived at 1227 at around 4:09 p.m. Eric Burton and Meagan Pursell were also in the car. Burton and Webb went into the house and left seven minutes later. Around 4:12 p.m. a black 1989 Buick coupe, registered to and driven by Wesley Hunter, arrived at 1227. Hunter entered the house and left three minutes later.

Officer Burke testified that, as he continued his surveillance of 1227 the next day, Webb, with Burton as his passenger, slowly drove by the house twice. At around 2:15 p.m., Collins arrived at the residence driving her red Toyota with Burton as a passenger. At 3:45 p.m., Hunter arrived at 1227 and went inside. Hunter came back out to his car, reached toward the floorboard, placed something in the left front pocket of his pants, and walked back in the house. At around 4:00 p.m., Hunter left and did not return that day. At 4:20 p.m., Webb returned to the house, entered it with Burton, and stayed a total of eight minutes before leaving.

On August 14, 2006, the officer again conducted surveillance of 1227 where he saw Webb return alone to the house. At 12:50 p.m., Officer Burke observed the Defendant and Burton get into the red Toyota, which was most often driven by Collins. Officers attempted to follow the Defendant, who was driving the Toyota, but they were unsuccessful. The officers returned to 1227 and waited for the Defendant's return. The Defendant and Burton returned at around 3:45 p.m.. Another officer initiated a traffic stop, based upon the Defendant's driving while his license was revoked. The officers ordered both men out of the car and placed the Defendant under arrest for driving on a revoked license. Officer Burke informed both men of their Miranda rights.

Officer Burke testified that he searched the car but did not find any weapons or narcotics. The officer escorted both men inside the house because it was raining heavily at the time. Once inside, he asked them questions the officer said were not "accusatory" in nature. While Investigator Denning conducted the search, Officer Burke stayed inside the house with the Defendant, Burton, and Yvonne Collins. Investigator Denning returned to the house and privately informed Officer Burke that he had found 37 pills in a root beer can, on which the tab was missing, in the red Toyota. Officer Burke asked the individuals who was drinking root beer, and Burton immediately stated he had not been drinking root beer. The Defendant said nothing. The officer then asked the Defendant if he removed the tabs from his soda cans, and the Defendant said "yes."

Officer Burke testified that, in his experience, there is a correlation between heavy vehicle traffic at a home and narcotics activity. The brief but repetitive visits to 1227 that he observed also indicated narcotics activity to the officer. The officer then identified the Defendant's driver's license history, which showed the State of Tennessee had revoked the Defendant's driver's license.

On cross-examination, Officer Burke testified that he never learned the identity of the anonymous caller who informed him of drug activity at 1227. The informant said the Defendant sold Dilaudid pills to Toni McCormick and Melissa Settle. The officer testified he never interviewed McCormick or Settle as part of his investigation. He also never interviewed the other people he saw enter or leave the residence. The officer agreed that he never photographed any drugs or money exchanging hands. Further, when he saw the Defendant talking with McCormick at the Dollar General Store, he did not see an exchange of money and drugs.

Officer Burke agreed that he misspoke when he stated that, on August 10, 2006, the Defendant was sitting in the driver's seat of a black passenger car. He corrected himself, saying that the Defendant was a passenger in that vehicle and exited from the passenger side door. The officer never identified the driver of that vehicle. Officer Burke agreed that, when Webb and Burton drove slowly by 1227, they could have been looking to see if the Defendant, who was Burton's father, was home. Therefore, when they saw the Toyota was gone, they continued driving. Officer Burke testified he did not send the root beer can for fingerprint analysis because he felt the Defendant's statement that he took the tab off his soda can and Burton's statement that Burton was not drinking root beer at the time was sufficient evidence against the Defendant.

On redirect examination, Officer Burke explained he did not interview McCormick after receiving information about her from the informant and observing her meet with the Defendant because he did not want word to get back to the Defendant that the Defendant was under surveillance by the police. On recross examination, the officer agreed that none of the other people he saw during the course of this investigation had been arrested.

William Stanton, a forensic scientist with the Tennessee Bureau of Investigation ("TBI") testified that the pills found by the officers in the root beer can were hydromorphone, also known as Dilaudid, a Schedule II substance. Further, he counted thirty-eight tablets. The agent testified

that the notations from the officers indicated that the officers had found the pills in a "Coke can." On cross-examination, Agent Stanton testified that he was not aware of the can being submitted to the TBI for testing. He agreed that, had the can been sent to the TBI, agents could have analyzed it for fingerprints.

Eric Burton, the Defendant's son and codefendant, testified that he was currently incarcerated in jail for theft and passing forged checks. He said he was, at one time, a Dilaudid addict but had been clean for nine months. Burton described how he would liquefy the Dilaudid pills and use needles to intravenously inject the drugs into his bloodstream.

Burton recalled that the morning of August 14, 2006, he arrived at the Defendant's house, and the Defendant asked if Burton wanted to accompany him to Nashville. Burton agreed because he was "jonesing" for a Dilaudid pill. Burton said that he and his father went to a Kmart in Madison, and Burton heard the Defendant talking on his cell phone setting up a meeting for later. He then accompanied his father to Old Hickory Boulevard, where the Defendant met with someone in a black SUV. Burton never saw the Defendant purchase Dilaudid pills. Burton testified he asked his father for a pill multiple times that day, but his father told him to wait until they returned to town.

Burton recalled being pulled over by the police and said that the Defendant stated "[O]h, shit, I'm busted." Burton was looking at the police officers coming from behind. Officers asked Burton if he knew where the pills were, and he responded negatively. Burton said that the officers later asked him if he was drinking root beer, and Burton told him that he had a root beer but he had not yet opened it. Burton recalled that his father's root beer was opened and in a "huggie" container. Burton never saw the Defendant put the pills into the Defendant's root beer can. Burton further testified that investigators asked him if he tore the tops off of his soda cans, and he said no, explaining that he turned the can tabs to the right. The Defendant responded that he tore the tabs off of his soda cans.

Burton testified that, at one point while the police questioned him, he and the Defendant were alone together. The Defendant asked Burton to take responsibility for this crime, saying that Burton would only spend a couple of years in prison whereas the Defendant might spend the rest of his life in prison. Burton said that the Defendant again asked him to take responsibility for this crime while the two were in the back of the police car together.

On cross-examination, Burton denied that the pills in the soda can belonged to him. He believed more pills were at the Defendant's house, even though the police did not find them when they searched the house. Burton said he did not know the Defendant was going to Nashville to get pills, but he assumed as much. He went with the Defendant because, usually, when the Defendant saw him "sick" all day because he needed a "fix" the Defendant would give him a pill. Burton said he had gone with his father previously to get Dilaudid pills.

On redirect examination, Burton testified that he had previously purchased Dilaudid pills from his father.

William Pelfrey, an investigator with the Sumner County Drug Task Force, testified that he was assigned to follow the Defendant while the Defendant was driving a Toyota on August 14, 2006. He followed him to a Kmart in Gallatin, and he said that the Defendant did not appear to meet with anyone there. Shortly after the Defendant left Kmart, the investigator was no longer able to follow him. The investigator, therefore, returned to the Defendant's house to set up a stationary surveillance of the Defendant's residence. On cross-examination, Investigator Pelfrey testified that he assisted in the search of the Defendant's residence and that officers did not find any drugs in the residence. They did, however, find what Investigator Pelfrey considered drug paraphernalia.

Brian Denning, an investigator with the Sumner County Drug Task Force, testified that he initiated the stop of the Defendant's car. After initiating the stop, he pulled into the Defendant's driveway at 1227 behind the Defendant's car. Investigator Denning testified he was at the Defendant's car door within thirty seconds, and he noticed a male passenger in the car. According to the investigator, the Defendant had a root beer in his hand and there was another unopened drink in the car. While the investigator assisted in the search of the Defendant's car, he found the pills in the root beer can that had initially been in the Defendant's hand.

On cross-examination, Investigator Denning testified that there were multiple times during this investigation that he was unable to stop someone who Officer Burke asked him to stop. He also said that he stopped a male driver on August 10 as part of this investigation, and he agreed that he did not ask for his driver's license or registration. The investigator conceded that his reports did not include his observation that the Defendant had a root beer can in his hand at the time of the stop. He explained, however, that he had unsuccessfully attempted to supplement his report. Investigator Denning testified that, when he first got to the car, the root beer can was between the Defendant's legs. When he searched the car, the root beer can, in which he found the pills, was located on the floorboard of the driver's side of the car.

The Defendant testified that he was not aware that the police had him under surveillance until after he was arrested. He said that Yvonne Collins was a friend of his with whom he lived. The Defendant explained how he knew each of the people that police had seen at his house. He said Burton was his son and Webb was Burton's friend. Hunter, who was also seen at his house, was Collins's friend. The Defendant said he had worked with Toni McCormick's husband for a long time and had known her for twenty or thirty years. He said he knew Melissa Settle through McCormick. The Defendant denied knowing Meagan Pursell. The Defendant denied that he had sold Dilaudid to any of those people. The Defendant testified that, when these people came to his house they were just "stopping by" to talk to him.

The Defendant described the events on August 14, 2006, stating that he and Burton got into the car together to go to Nashville. Collins did not accompany them because she was not feeling well. She called them while they were in Nashville and asked them to return with her car. They stopped briefly at a BP station and then went back to the house. Upon their return, police pulled in behind their car in the driveway. The Defendant said he gave police permission to search the car because he did not think any drugs were in the car. When the officer returned from searching the car, he handcuffed Burton, and said, "I thought you said there wasn't

[any]thing in the car." The Defendant did not recall Burton's response. The Defendant said the officers asked him if he had been drinking a root beer, and he said "yes." He testified that he had a cooler of root beer in the car and that both he and Burton were drinking root beer. The Defendant denied having any Dilaudid pills in his possession on that day. Further, he said that he was unaware that Burton had any Dilaudid pills, and he did not see him put the pills in a can.

The Defendant testified about his relationship with Burton, saying that it had been "kind of rocky." The two, he said, had not had any kind of a relationship since they had been arrested. The Defendant acknowledged that he knew Burton was addicted to Dilaudid pills. He said that he had also previously been addicted to the pills himself but had undergone methadone treatment to overcome this addiction. He said the last time he had used Dilaudid was well before he was arrested.

The Defendant explained that the "paraphernalia" that officers said they found was not drug paraphernalia. He said that he used the cotton swabs and alcohol to clean his pores. The Defendant also testified that he told officers that he did not take the tabs off of his soda cans and that he never had. He said that the can cover found over the root beer can was not his, and he assumed it was Burton's cover.

On cross-examination, the Defendant testified that the root beer can and can cover were not his and that the can was not between his legs when the officer approached the car. He acknowledged that he was guilty of driving on a revoked license.

Based upon this evidence, the jury convicted the Defendant of possession of a Schedule II controlled substance, a Class A misdemeanor; driving on a revoked license, second offense, a Class A misdemeanor; and attempting to tamper with evidence, a Class D felony.

B. Sentencing Hearing

At the sentencing hearing, the presentence report was admitted into evidence. The trial court informed the parties that he had before him "copies . . . of the judge's records" and that he could take judicial notice of those records because they were from the same court. He then noted that the Defendant had previous convictions for selling Dilaudid, driving under the influence, and driving after being declared an habitual motor vehicle offender, which gave him at least three felonies that could be used to sentence him as a Range II offender.

The Defendant testified, saying that he was fifty-four years old and had never meant to hurt anyone. He said that he had been a drug addict but that he was trying to "do better," and he asked the court to sentence him to probation.

After arguments of counsel, the trial court found:

> And in determining the appropriate sentence for this offense or these offenses, I've considered the evidence presented at trial, the sentence hearing, the presentence report, and the principles of sentencing. . . . [A]nd I have considered

> what our legislature has said, that punishment shall be imposed to prevent crime and promote respect for the law by providing an effective general deterrent to those likely to violate the criminal laws of this state; by restraining defendants with a lengthy history of criminal conduct; encouraging effective rehabilitation of those defendants, where reasonably feasible, by promoting the use of alternative sentencing and correctional programs that elicit voluntary cooperation of defendants.

The trial court determined the Defendant was a Range II offender and then afforded two applicable enhancement factors "great weight": that the Defendant had a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; and (2) that he was the leader in the commission of an offense involving two or more criminal actors. The trial court found that there were no applicable mitigating factors and sentenced the Defendant to: eleven months and twenty-nine days, at 75 percent, for the possession of a Schedule II controlled substance conviction; eleven months and twenty-nine days for the driving on a revoked license, second offense, conviction; and eight years for the attempting to tamper with evidence conviction.

When determining whether the Defendant should receive probation, the trial court noted the Defendant's stated physical and mental health problems. He found the Defendant's credibility "very poor," stating that the Defendant "did not tell the truth." He then described the Defendant's social history, stating:

> Your social history, evidence shows that you dropped out of school in the eighth grade. You list three sons and daughters living somewhere in Tennessee. You have not seen your youngest children since 1992. That's 16 years. You never hear from them.
>
> . . . .
>
> You have had no employment since 1990. You state you're homeless since 2004. You've stayed with various people since then. You indicate that lady friends collected money for your bond, and that's how you made bond.
>
> Your alcohol situation is about as bad as it gets. You first used alcohol at age 12 or 13, and you used off and on for 42 years. You said your last use in the presentence report was a year ago. That's another untruth because you were arrested for public drunk in May of 2007. You were first involved in underage drinking at age 17. You have not one, not two, not three, not four, not five, not six, nor seven, you've got eight, eight DUI convictions.
>
> You began using drugs at age 16 – that's 38 years of your life – Dilaudid, heroin, marijuana. You sold Dilaudids in your history. You've been to the Samaritan Center in the 1980s for alcohol and drugs, and you went to the

methadone clinic at the end of 2005, and you were in treatment there for 9 to 10 months. . . .

I've considered the facts and circumstances surrounding the offense and the nature and circumstances of the criminal conduct involved. Now it might seem harmless or no big deal for [the Defendant] to get in a vehicle and take his son to Nashville to pick up Dilaudids and then come back, because that has been part of your life. The aggravating factors are that your son was jonesing; he was addicted; he was having difficulty that day. And, sir, you have at least seven prior driving on revoked license convictions. Nothing has deterred you, absolutely nothing. So it's aggravating to that extent.

Now, prior criminal history of the defendant . . . . Your record, criminal record begins on page 5 and goes for 7 pages in this presentence report. You have a violation[] of the law at age 17 and it continued all the way up to now, 37 years. There are three felonies, 33 misdemeanors, some of these committed while you were out on bond, some while you were on probation. Your criminal history is about as bad as it gets.

I've considered the previous actions and character. Poor. You are not truthful. You're not truthful in front of the jury. You are not truthful to the presentence person in the report. I see no integrity. I see no character. I see no truth. I see no foundation in your life other than allegiance to yourself and what gets you through. I see one who would sacrifice your own son to get out of criminal charges, and I see one who has introduced the death of Dilaudid to many in the community.

. . . .

But one thing about your criminal history that has meant a lot to me in this is reflected in Case No. 228-2001. As part of this file in that case that I have taken judicial notice of, you were convicted of two felonies for possessing Dilaudid for resale. I have noted certain things in this affidavit of probable cause for a search warrant that I think needs to be reflected on the record and needs to be part of your resume of criminal history.

The second paragraph states that on or about October 1st, 1999, your affiant, who was at that time with the Sumner County Drug Task Force, received a complaint that Dilaudids were being sold by Ernest "Buddy" Burton and a Ms. Yvonne Collins at 101 Drivers Lane in Gallatin. Well, you've got the same people, same song, second verse.

During the months of June and July of 2000 your affiant along with the Gallatin Police Department and the Sumner County Sheriff's Department received several complaints on the subject named Ernest "Buddy" Burton located

at 114-A Locust Street. During the course of the surveillance, large amounts of traffic was observed going to the residence and then leaving the residence after staying inside for only a few minutes.

July 20th, 2000, your affiant had obtained a drivers' license permit that showed Ernest "Buddy" Burton as being revoked for driving on a revoked license. The interdiction team stopped Mr. Burton for driving on a revoked license. Same song, second verse. It's just one of your many, may days that you feel like the law doesn't apply to you.

There were three Dilaudid pills found in the vehicle in a glass vial under the console of the Chevy Suburban. A search warrant was obtained. Nine and a half Dulaudids were obtained in that residence. Your affiant could not locate any viable means of income and currency was seized as state proceeds from the drug sales.

Just four days later the task force interviewed Susan Gilbert and she stated to the task force that her husband, Herbert, got Dilaudid from you. She stated that he had bought Dilaudid from you on 7/23/2000, and that you had told Herbert that the drugs task force had missed approximately 100 pills of Dilaudid when they raided your home on July 20th, 2000.

On January 26, 2001, a little over six months later, things got so bad they set up surveillance again at 114-A Locust Street. Mr. Burton, on January 31st, 2001, this affiant states under oath that there was an undercover buy operation in Gallatin, Sumner County, Tennessee area, your house. What happened on that particular date, if I could paraphrase, the confidential informant that was utilized by the task force contacted Mr. Thomas Biggs to get Dilaudid. Mr. Biggs stated he could get some Dilaudid, and he went to your residence, and then at your residence he was given Dilaudid.

On February 2nd, just a few days later, the same thing happened. The confidential informant made contact with Mr. Biggs who agreed to go to a friend. He called Buddy to get two Dilaudid, and they went to your house, and he was observed entering the residence and exiting the residence after three minutes. There were two Dilaudid pills sold on that date.

2/6/01, the confidential informant entered the residence again of Mr. Biggs to make contact with him. He went to your residence, spent four minutes, and the – Mr. Thomas Biggs stated that the pills – that he had the pills and the guy said the price on 10 or more pills was $20 a piece.

And then on February 13th, we've got direct buys from you. You sold Dilaudid directly to the confidential informant. The task force observed the confidential informant make contact with you standing in the driveway of your

> residence. The confidential informant went inside with you and stayed with you for an hour, and then came out.
>
> And then on 2/14/2001, there was a similar situation, a direct buy from you from the confidential informant. That is five purchases within two weeks. I consider that as part of your criminal history.

The trial court noted other convictions in the judicial records, including simple possession of Dilaudid, and two counts of possession of Dilaudid for sale. He stated that the Defendant had not successfully completed probation for these offenses and that measures less restrictive than confinement had frequently or recently been applied unsuccessfully to the Defendant.

The trial court found probation was not appropriate because confinement was necessary to protect society from the Defendant who has a long history of criminal conduct, because confinement was necessary and particularly suited to provide an effective deterrent to others, and because measures less restrictive than confinement had frequently or recently been applied unsuccessfully to the defendant. Based upon the Defendant's extensive criminal history, the trial court ordered two of the sentences to run consecutively. It is from this judgment that the Defendant now appeals.

II. Analysis

On appeal, the Defendant contends: (1) the trial judge erred when he failed to *sua sponte* recuse himself; (2) the trial judge improperly commented on the credibility of a state witness in the presence of the jury; (3) the trial judge conducted an improper, independent investigation of the Defendant's prior criminal history before sentencing the Defendant; and (4) the trial judge ordered the Defendant to serve an excessive sentence.

A. Recusal

The Defendant contends that the trial court erred when it refused to *sua sponte* recuse himself. He asserts that the trial judge, who was a prosecutor for twenty-seven years, had extensive prior knowledge about the Defendant's criminal history and probation performance. Further, the Defendant asserts that, while he was an assistant district attorney, the trial judge prosecuted the Defendant. Therefore, the Defendant asserts, the trial judge was unable to be fair and impartial. The State responds first that the Defendant has waived this issue by: (1) failing to cite to the record; (2) failing to file a motion to have the trial judge recuse himself; and (3) failing to make a contemporaneous objection. The State next notes that the Chair of the Judicial Ethics Committee issued a letter stating that the trial judge could properly hear the case so long as he did not have personal knowledge of the matter involved therein. Finally, the State asserts that there is no evidence that the trial judge had personal bias or prejudice concerning this case.

The State correctly notes that the Defendant has risked waiving this issue by failing to cite to the record. "Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court." Tenn. R. Crim. App.

10(b). Further, we note that the Defendant did not file a motion requesting the trial judge recuse itself and he failed to make a contemporaneous objection. In fact, during a jury out proceeding, the Defendant's counsel stated "Right. And I'm not asking that you recuse yourself. We've already been over that ground." While a party should seek to take whatever action reasonably available to prevent or nullify an error a trial judge must disqualify himself *sua sponte* under certain circumstances. Tenn. S. Ct. Rule 10; *cf. Thompson v. State*, 958 S.W.2d 156, 172 (Tenn. Crim. App. 1997) ("'[I]f the facts are known to the party recusing, he is bound to make his objection before issue joined, and before the trial is commenced otherwise he will be deemed to have waived the objection . . . .'") (quoting *Holmes v. Eason*, 76 Tenn. 754 (1882)). We will address this issue on its merits.

Prior to trial, the judge presiding over this trial, Judge Dee David Gay, requested the opinion of the Judicial Ethics Committee Chair about whether Judge Gay could preside over cases that were pending during the time that he was an Assistant District Attorney General. In a letter responding to this request, the committee chair, Judge Alan E. Glenn, stated:

> My understanding is that you were not involved with the investigation, presentation to the grand jury, or court proceedings as to the criminal cases over which you would be presiding as a trial judge. Additionally, you did not have supervisory authority over the attorneys who did so. Accordingly, in my opinion, you are not required to recuse yourself from such matters.

Judge Glenn further recommended that Judge Gay state on the record his lack of previous involvement in the case. In the case under submission, Judge Gay did so state on the record, and the parties acknowledged this statement.

> Tennessee Supreme Court Rule 10, Canon 3(E)(1)(a) and (b) provides as follows:
>
> (1) A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> > a) the judge has a personal bias or prejudice concerning a party . . . or personal knowledge of disputed evidentiary facts concerning the proceeding;
> >
> > b) the judge served as a lawyer in the matter in controversy . . . or the judge has been a material witness concerning it.

Article VI, § 11 of the Tennessee Constitution provides that a judge should not preside over a trial "in which he may have been of counsel, . . . except by consent of all parties." Similarly, Tennessee Code Annotated section 17-2-101(3) requires recusal when the judge "[h]as been of counsel in the cause" except by consent of all the parties.

A trial judge should grant a motion to recuse if he or she has any doubt as to his or her ability to preside impartially in a criminal case, or whenever he or she believes that his or her impartiality can reasonably be questioned. *State v. Thornton*, 10 S.W.3d 229, 237 (Tenn. Crim. App. 1999) (citing *Lackey v. State*, 578 S.W.2d 101, 104 (Tenn. Crim. App. 1978)). This is an objective standard. *Pannell v. State*, 71 S.W.3d 720, 725 (Tenn. Crim. App. 2001) (citing *Alley v. State*, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994). "Thus, while a trial judge should grant a recusal whenever the judge has any doubts about his or her ability to preside impartially, recusal is also warranted when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartially." *Id.* (citing *Alley*, 882 S.W.2d at 820 (citations omitted)). Generally, the trial judge retains discretion over his recusal. *State v. Smith*, 906 S.W.2d 6, 11 (Tenn. Crim. App. 1995). Unless the evidence in the record indicates that the trial judge clearly abused his discretion by not disqualifying himself, this court will not interfere with his decision. *Pannell*, 71 S.W.3d at 725 (citation omitted).

After reviewing the record in this case there is nothing to indicate that the trial judge was subjectively unfair or impartial. Nevertheless, we must also determine whether recusal was objectively required. *See State v. Conway*, 77 S.W.3d 213, 225 (Tenn. Crim. App. 2001) (citations omitted). In *Conway*, this Court addressed a defendant's claim that the trial judge's participation as a prosecutor in his prior conviction precluded his participation in the defendant's subsequent trial on different charges, in part because the prior conviction was used to enhance the defendant's sentence. *Id.* at 224-25. In that case, this Court concluded that the judge was not required to recuse himself. *Id.* at 225. The decision in *Conway* cited *State v. Warner*, a case in which our Supreme Court held that the Tennessee Constitution did not require recusal where the judge was the district attorney when a defendant was convicted of two of the underlying offenses charged in the habitual criminal indictment. *Id.* at 725 (citing *State v. Warner*, 649 S.W.2d 580, 582 (Tenn. 1983). As additional support for our decision in *Conway*, the Court noted that our Supreme Court has limited the scope of Cannon 3(E)(1)(b) to "the cause on trial . . . and not . . . prior concluded trials . . . ." *Conway*, 77 S.W.3d at 225 (citing *State v. Smith*, 906 S.W.2d 6, 12 (Tenn. Crim. App. 1995)); c*f. Pannell*, 71 S.W.3d at 725 (holding that trial judge's impartiality might have reasonably been questioned given his former relationship as step-parent to the victim).

In accordance with these previous decisions by this Court and our Supreme Court, we conclude that neither the Tennessee Constitution, Tennessee Code Annotated section 17-2-101(3), nor Cannon 3(E)(1) mandated that Judge Day recuse himself. While Judge Day had previously prosecuted the Defendant there is no indication that he used confidential or privileged information when conducting the trial at issue or when sentencing the Defendant. We further conclude that the trial judge's impartiality could not be reasonably questioned, without further supporting evidence, by the fact that he had previously prosecuted the Defendant on an unrelated matter. As such, the Defendant is not entitled to relief on this issue.

B. Trial Judge Statement During Burton's Testimony

The Defendant next asserts that the trial court improperly commented on the credibility of Burton, the Defendant's son who testified for the State. In light of the Defendant's allegations, we find it necessary to describe at length what occurred during the Defendant's trial. During the Defendant's cross-examination of Burton, the Defendant attempted to impeach Burton using testimony Burton offered while previously under oath as a prior inconsistent statement. The Defendant's counsel stated:

> Q. General James asked you while you were there under oath in the presence of counsel, he said, Mr. Burton, on August 14, 2006, you were pulled over by Larry Burke. . . .
>
> Do you recall . . . that question? Okay.
>
> The next question General asked is, What happened when they pulled you over? And your answer was, They pulled me out of the car and asked me was there anything in the car, and I told them I did not know. And then they went to search the car and found pills in the car.
>
> Do you remember giving that statement?
>
> A. Yes, sir.

The Defendant's counsel continued to read the transcript of the prior proceedings verbatim, asking occasionally if Burton recalled making those statements. He sometimes asked Burton additional questions about his statement. This went on for some time, and then the following occurred:

> Q. All right. Now, the General asked you back on May 17th of this year, 2007, he said, Do you know where he got [the pills]? And your answer was, No, I do not.
>
> A. No.
>
> Q. Do you recall – well, you said, no, I do not.
>
> A. I'm saying, no, I do not.
>
> Q. But now here today under oath you're testifying that he got them from somebody in a black SUV on Old Hickory Boulevard.
>
> A. I did not say that. I said he met somebody in a black SUV. I did not say he got pills from him. I said he met somebody in a black SUV.
>
> Q. Well, if you didn't say it, you insinuated that's where he got them. You said he talked to somebody on the phone about meeting them.
>
> A. Right.
>
> Q. So you're saying today – you said back on May 17th, you don't know where he got them, but then you're leading this jury to believe that that's where he got them. So, I mean, which is it? Were you lying then or are you lying now about –
>
> GENERAL JAMES: Objection, Your Honor.
>
> WITNESS: I'm not lying.
>
> GENERAL JAMES: He's trying to explain his answer.
>
> THE COURT: I sustain the objection. The question is argumentative. And, Mr. Ingrum, the proper way to cross-examine is if there are any inconsistent statements that were made in that statement inconsistent with his testimony today,

you can ask him about the inconsistent statements, and if he denied them, then you can ask him.

[DEFENSE COUNSEL]: Well –

THE COURT: So we don't need to go through the statement question by question, but you can ask him about inconsistent statements from that statement or what he testified to today. So proceed.

[DEFENSE COUNSEL]: Well, Your Honor, I'm not trying to be argumentative. It is cross-examination, and I am asking –

THE COURT: There's a proper way to do inconsistent statements, and you don't go through the entire statement.

[DEFENSE COUNSEL] I think the whole statement is inconsistent with what he's testifying to today, and that's the –

THE COURT: So far I haven't heard one thing.

[DEFENSE COUNSEL]: Well . . .

Later, in a jury out proceeding, the Defendant's counsel objected to the trial court's statement, "So far I haven't heard one thing," as an inappropriate comment on the evidence. In response, the trial court stated:

> Now, the next thing that you bring up is the statement or method of cross-examination, and I let you go on asking those questions. What you were doing, you were asking every question over and over again on the prior statement, and that is not the correct way of cross-examining one involving a prior inconsistent statement. And when the General objected, it was an argumentative question.
>
> I also took that opportunity to try to suggest a proper way to do it, and the proper way to do it is if the defendant – or if the witness testified as to something contrary on the prior inconsistent statement, then you say, well, didn't on such and such a date you say this, and that should be inconsistent. And then if the witness denies it, then you could confront him with the inconsistent statement. If he admits it, then you've caught him [in] a[n] impeachable situation there, and your cross-examination has been fruitful.
>
> But as the General stated, I was sitting and listening and the more you questioned him, the more he was backing up and being more credible and, you know, I know you're an advocate for your cause, but I'm going to follow the rules of evidence, and I don't know of any way for anybody to put on a prior statement other than the way that I've done it. You just don't put it down or lay it down in front of a jury, and say this is another statement; compare the two. There are proper ways to do it, and that's what I did.
>
> And you were the one that brought up the argument after I told you the way to do it, and I told you that there was nothing that was inconsistent, and you're the one that brought it up, and I was responding to your argument. So . . . . [n]othing has occurred that's improper, and I'll continue to run this trial by the

rules of evidence.

The trial judge later offered to instruct the jury that "they are not to consider [his] rulings as opinion on the credibility of witnesses," and the Defendant's counsel declined, saying that he did not want to draw unnecessary attention to the trial court's comment.

In response to the Defendant raising this issue in his motion for new trial, the trial judge stated:

> Second ground, that I commented about the testimony, and in doing that I gave the jury an impression about the credibility of Mr. Dewayne Burton. Let the record reflect that this was an evidentiary issue. [The Defendant's counsel] was attempting to cross-examine this witness in an [im]proper evidentiary fashion. The witness should have been confronted with the inconsistent statement and then given the opportunity to admit or deny it, and then the impeachment is appropriate. I made that ruling, and I attempted to state that to [the Defendant's counsel], but being tenacious as he is, he continued. And I told him the proper method of impeachment with prior inconsistent and consistent statements, and in making an evidentiary ruling about prior inconsistent and consistent statements, one must say "consistent and inconsistent." And it was in that context, an evidentiary context, that I made those rulings.

Tennessee Rule of Evidence 104(a) states, "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court . . . ." The Defendant in this case sought to introduce Burton's previous statement as a prior inconsistent statement. Prior inconsistent statements are not substantive evidence and should only be considered by the jury to evaluate the credibility of the witness. *State v. Carter*, 15 S.W.3d 509, 514 (Tenn. Crim. App. 1999). Accordingly, our Rules of Evidence mandate that:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is not admissible is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

Tennessee Rule of Evidence 613(b). The practice set forth to properly use this type of evidence requires that a witness's attention be drawn to the place, persons present, time of the statement, and to the substance of the statement before extrinsic evidence of the prior inconsistent statement could be used to impeach the witness's credibility. *State v. Martin*, 964 S.W.2d 564, 567 (Tenn. 1998) (citing *Middle Tenn. R.R. Co. v. McMillan*, 134 Tenn. 490, 515-16, 184 S.W. 20 (1916)).

We conclude that the trial court's statement, "So far I haven't heard one thing" was not a comment on the evidence but rather a statement about the admissibility of Burton's prior testimony. The trial court tried to explain to the Defendant's attorney the proper impeachment method. The Defendant's counsel then argued that he was properly cross-examining the witness

using a prior inconsistent statement. The trial court's comment addressed whether the previous testimony was inconsistent, so as to be admissible. We agree that a better practice may be to have a hearing outside the presence of the jury, but that responsibility lies with the Defendant's counsel. If the Defendant's counsel chooses to argue in front of the jury that evidence should be admissible because it is inconsistent, he must surely be aware that the trial court may disagree, also in the presence of the jury. Accordingly, we conclude that the trial court did not err when it made the aforementioned statement, and the Defendant is not entitled to relief on this issue.

C. Defendant's Prior Criminal History

The Defendant next contends the trial judge erred when it reviewed several old criminal court files to sentence the Defendant. He asserts that the trial court said it could take "judicial notice" of the Defendant's prior record and past performance while on probation, which, the Defendant argues, is an improper independent investigation by the trial court. In support of his contention, the Defendant cites Tennessee Rules of the Supreme Court Rule 10, Cannon 3, which states, "A judge must not independently investigate facts in a case and must consider only the evidence presented." Tenn. R. S. Ct. 10, Cannon 3(B)(7).

As previously stated, while sentencing the Defendant, the trial court stated:

> [O]ne thing about your criminal history that has meant a lot to me in this is reflected in Case No. 228-2001. As part of this file in that case that I have taken judicial notice of, you were convicted of two felonies for possessing Dilaudid for resale. I have noted certain things in this affidavit of probable cause for a search warrant that I think needs to be reflected on the record and needs to be part of your resume of criminal history.

The trial court went on to describe the information included in the affiant's statement. Denying the Defendant's motion for new trial, the trial court stated with regard to this issue:

> [T]he only thing I pulled that was not in the presentence report was the prior affidavit of complaint or the prior affidavit from the search warrant where the defendant was convicted in a multicount indictment of two possession of Dilaudid for resale. That pales in comparison to the other considerations that I looked at, the other things that I've looked at in imposing a sentence in this case.
>
> I deny that I conducted my own investigation about – to facts that are collateral to this case. And because of that, I find that this issue is not well taken, and you have the right to pursue this issue on appeal.

The trial court considered this evidence when it determined the Defendant's range and when it denied the Defendant's request for probation. The Defendant never objected to the trial court's consideration of this evidence. A party's failure to make a contemporaneous objection typically results in a waiver of the issue on appeal. Tenn. R. App. P. 36(a); *State v. Thompson*, 36 S.W.3d 102, 108 (Tenn. Crim. App. 2000).

Even if not waived, the Defendant is not entitled to the relief he seeks. While not clearly marked as such in the record, there appears to be an affidavit supporting a search warrant included in the record as an exhibit from the sentencing hearing. This appears to be the affidavit to which the trial court refers when sentencing the Defendant. The affidavit includes the affiant's observations of the Defendant's activities selling Dilaudid from his home on a previous occasion.

The trial court may take judicial notice of any fact that is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Tenn. R. Evid. 201. The trial court may take judicial notice "whether requested or not," Tenn.R.Evid. 201(c), and the notice may be taken at any stage of the proceeding. Id. at 201(f). A court may take judicial notice of facts in an earlier proceeding in the same case, and the final action taken in the case. *Pruitt v. State*, 460 S.W.2d 385, 395 (Tenn. Crim. App. 1970). Judicial notice in such cases has been applied, for instance, to recognize the previous conviction and the record on direct appeal in considering a post-conviction petition, *Trolinger v. Russell*, 446 S.W.2d 538, 542 (Tenn. Crim. App. 1969), a finding that a defendant is a habitual offender, *Pruitt,* 460 S.W.2d at 395, or a proceeding for a writ of habeas corpus, *State ex rel. Leighton v. Henderson*, 448 S.W.2d 82, 89 (Tenn. 1969). In *Trolinger*, the court commented that the trial court "took judicial notice of all of its prior judgments, records, etc., as a matter of fact." 446 S.W.2d at 542.

We conclude that the facts listed in the previous affidavit are judicially noticeable. The affidavit was from a case involving the same Defendant conducting the same activities, which resulted in a conviction in the same court for the same offense, the selling of Dialudid. The trial court did not err when it took judicial notice of its own court records. Further, there is ample evidence contained in the record before us to support the Defendant's confinement, including his lengthy criminal history and his lack of success on probation. Accordingly, we conclude that the Defendant is not entitled to relief on this issue.

D. Sentencing

Finally, the Defendant asserts that the sentence imposed by the trial judge was excessive. He asserts that the trial court ignored applicable mitigating factors and misapplied or put too much weight on the enhancement factors argued by the State. The Defendant fails to cite to the record or to any legal authority to support his argument. "Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court." Tenn. R. Crim. App. 10(b). Accordingly, we conclude that the Defendant has waived our review of his sentence. He is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the record and relevant authorities, we affirm the judgments of the trial court.

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ROBERT W. WEDEMEYER, JUDGE